SUPREME COURT OF THE UNITED STATES.

No. ~~202~~. 89.

RICHARD GREGG AND CHARLES BALLANCE, PLAINTIFFS IN ERROR,

vs.

ROBERT FORSYTH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

GOVERNMENT PRINTING OFFICE.

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1 In the circuit court of the United States, northern district of Illinois.

ROBERT FORSYTH
v.
RICHARD GREGG and CHARLES BALLANCE. } Ejectment.

Be it remembered, that at the October term of said court for the year one thousand eight hundred and sixty-two, the defendants moved the court for a writ of restitution, and on the hearing of said motion the following exceptions were allowed by the court, as made by the defendants, to wit:

Bill of Exceptions.

U. S. circuit court, district of Illinois.

ROBERT FORSYTH
v.
RICHARD GREGG and CHARLES BALLANCE. } October term, A. D. 1862.

2 Be it remembered, that on the thirteenth day of said month, at said term of said court, the defendants' motion for a writ of restitution, in said cause, came on to be heard, which motion was in the words and figures following, to wit:

In the circuit court of the United States for the northern district of Illinois.

ROBERT FORSYTH
v.
RICHARD GREGG and CHARLES BALLANCE. } October term, A. D. 1862.

Said defendants move the court to set aside the writ of possession herein, and all the proceedings under it, and to grant a writ of restitution to said defendants, that they may be restored to all they have lost by reason of said wrongful judgment that had been entered against them in this court, but which judgment, by the consideration of the Supreme Court of the United States, at its December term, commencing on the first Monday of December, A. D. 1860, was annulled, set aside, and for nothing held.

3 C. BALLANCE,
For Defendants.

Endorsed: Filed Oct. 11, 1862.

WM. H. BRADLEY, *Cl'k.*

To sustain said motion defendants read to the court the following judgment:

ROBERT FORSYTH
v.
RICHARD GREGG and CHARLES BALLANCE. } Ejectment.

Now come again the parties, by their attorneys, and now come also the jury heretofore empanelled herein, and after receiving instructions from the court the jury retired to consider of their verdict, and after a short absence returned into court with the following verdict, to wit: We, the jury, find the defendants guilty of unlawfully withholding from the possession of the plaintiff the real estate and premises described in the plaintiff's declaration, to wit, certain premises situated in the county of Peoria, in the State of Illinois, and described as follows, to wit: part of a lot in the village of Peoria, covered by claims sixty-two and sixty-three, as confirmed by the confirmatory act of Congress approved March 3d, 1823, entitled "An act
4 to confirm certain claims to lots in the village of Peoria, in the State of Illinois," described as follows, to wit: "Commencing at a point in said lot on Front street three feet northeasterly from the most southerly corner of said lot, thence southwesterly on said line of said Front street three feet to the most southerly corner of said lot, thence on the southwesterly line of said lot two hundred and seventy-one feet ten inches, thence northeasterly on the line of Water street, as laid out over said lot by Charles Ballance in his addition to the town of Peoria, nineteen feet, thence southeasterly to the place of beginning." We also find the estate established in the plaintiff on trial to be an estate in fee simple, and assess his damages at the sum of one cent.

It is thereupon considered and adjudged by the court that the plaintiff have and recover of the defendants possession of the said described real estate and premises, according to the force, form, and effect of his said recovery, and that he have a writ of possession therefor; and that he also have and recover of the defendants the said sum of one cent, his damages, together with his costs by him about his suit in this behalf expended, amounting to the sum
5 of dollars and cents, and that he have execution therefor.

And which judgment was carried up by writ of error, and which writ of error was dismissed by the Supreme Court before the writ of possession was issued.

They read to the court the writ of possession issued upon said judgment, and the return of the marshal endorsed thereon, which is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

Whereas Robert Forsyth, plaintiff, has lately, in our circut court of the United States for the northern district of Illinois, by the judg-

ment of the said court, recovered against Richard Gregg and Charles Ballance, defendants, the following described real estate and premises, to wit: certain premises situated in the county of Peoria, in the State of Illinois, and described as follows, to wit, part of a lot in the village of Peoria, covered by claims sixty-two and sixty-three as confirmed by the confirmatory act of Congress, approved
6 March 3d, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois," described as follows, to wit, commencing at a point in said lot on Front street three feet northeasterly from the most southerly corner of said lot, thence southwesterly on said line of said Front street three feet to the most southerly corner of said lot, thence on the southwesterly line of said lot two hundred and seventy-one feet ten inches, thence northeasterly on the line of Water street, as laid out over said lot by Charles Ballance in his addition to the town of Peoria, nineteen feet, thence southeasterly to the place of beginning, which said premises have been, and still are, unjustly withheld from the said Robert Forsyth by the said Richard Gregg and Charles Ballance, whereof they are convicted, as appears to us of record, and forasmuch as it is adjudged in the said court that the said plaintiff have execution upon his said judgment against the said defendants, according to the force, form, and effect of his said recovery:

Therefore we command you that, without delay, you deliver to the said Robert Forsyth possession of the premises so recovered,
7 with the appurtenances, and that you certify hereon to our said court, in ninety days from the date hereof, in what manner you shall have executed this writ. And we further command you that of the goods and chattels, lands and tenements of the said Richard Gregg and Charles Ballance, defendants, you cause to be made the sum of forty dollars and fifty-one cents, which the said plaintiff also recovered against said defendants for his damages, costs, and charges in that behalf expended, whereof the said defendants are convicted, as appears to us of record, and have you that money ready in ninety days to render to the said plaintiff for his damages, costs, and charges aforesaid.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid,
[L. S.] this second day of August, in the year of our Lord one thousand eight hundred and fifty-nine, and of our independence the eighty-fourth year.

WM. H. BRADLEY, *Cl'k.*

Marshal's Return.

8 Came to hand Aug't 6th, 1859, at 4 o'clock p. m.

As within commanded, I did, on this 8th day of August, 1859, deliver possession of the within described premises to the within named Robert Forsyth.

C. N. PINE, *U. S. M.*,
By IRAM NYE, *Dep't.*

By virtue of the within I have, this 16th day of August, 1859, levied on all the right, title, and interest of the defendant, Charles Ballance, in and to a claim of seven acres, more or less, of land situated in the city and county of Peoria, Illinois, and known and described as claim No. sixty-four, (64) as confirmed to the legal representatives of Antoine Lepencie by act of Congress of March 3d, 1823; said tract being in Ballance's addition to the city of Peoria, and being part of the southwest quarter of section nine, (9) town eight, (8) north of range eight, (8) east of the fourth principal meridian. After giving legal notice I did, on the 30th day of March, 1860, offer the above described property for sale, at the front door of the court-house, in Peoria, and Robert Forsyth having bid therefor one hundred and seventy-six $\frac{6}{100}$ dollars, and that being the highest
9 and best bid made therefor, the same was sold to him at that price, which amount satisfies this and *and* another writ, No. 2255, in full.

C. N. PINE, *late U. S. M.*,
By IRAM NYE, *Dep't.*

Endorsed: Filed Ap'l 10, A. D. 1860.
WM. H. BRADLEY, *Cl'k.*

They then read to the court a mandate obtained on a second writ of error, which is as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States, for the northern district of Illinois, greeting:

Whereas lately, in the circuit court of the United States for the northern district of Illinois, before you, or some of you, in a cause between Robert Forsyth, plaintiff, and Richard Gregg and Charles Ballance, defendants, in ejectment, the judgment of the said circuit court was in the following words, viz: "It is thereupon ordered and adjudged by the court that the plaintiff have, and recover of and from the said defendants, possession of the said described land
10 and premises, according to the force, form, and effect of his said recovery, and that he have a writ of possession therefor, and that he also have and recover of the said defendants the said sum of one cent, his damages as aforesaid assessed, together with his costs by him about his suit in this behalf expended, amounting to the sum of dollars and cents, and that he have execution therefor, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears:

And whereas in the present term of December, in the year of our Lord one thousand eight hundred and sixty, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel: On consideration whereof,

it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is hereby reversed, with costs, and that the said defendants recover against the said Robert Forsyth, the plaintiff, one hundred and thirty-
11 one dollars and fifty-one cents for their costs herein expended, and have execution therefor. And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court, with directions to award a venire facias de novo.

14 MARCH.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity to the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Hon. Roger B. Taney, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty.

Costs of defendants.

Clerk	$111 51
Attorney	20 00
	$131 51

Taxed by—

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Endorsed: Filed Nov. 11th, 1861.

WM. H. BRADLEY, *Clk.*

Whereupon the court, after inspecting said documents and
12 giving due consideration to the subject, overruled said motion and refused to grant a writ of restitution in this case, the case being still pending and undetermined in this court. To which opinion of the court the said defendants then and there excepted, and prayed that this, his bill of exceptions, be sealed, signed, and made of record, which is accordingly done.

THOMAS DRUMMOND. [L. S.]

Endorsed: Filed Oct. 15, 1862.

WM. H. BRADLEY, *Clk.*

And thereupon the defendants, on the 14th day of October, A. D. 1862, filed their writ of error and citation in the words and figures following, to wit :

Writ of Error.

UNITED STATES OF AMERICA,
Northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the ren-
13 dition of a judgment, in a plea which is in said court before you, between Robert Forsyth and Richard Gregg and Charles Ballance, a manifest error hath happened, to the great damage of the said Richard Gregg and Charles Ballance, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment therein be given, that there, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme
[L. S.] Court of the United States, this fourteenth day of October, in the year of our Lord one thousand eight hundred and
14 sixty-two, and of our independence the eighty-seventh.

WM. H. BRADLEY, *Clerk.*

Endorsed: Filed Oct. 14, 1862.

WM. H. BRADLEY, *Clk.*

Citation.

United States of America to Robert Forsyth, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Richard Gregg and Charles Ballance are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas Drummond, one of the jus-
15 tices of said court, this fourteenth day of October, A. D. 1862.

THOMAS DRUMMOND.

Endorsed: Filed Oct. 14, 1862.

WM. H. BRADLEY, *Clk.*

And afterwards, on the 15th day of October, A. D. 1862, the said defendants filed their appeal bond in the words and figures following, to wit:

Appeal Bond.

SUPREME COURT OF THE UNITED STATES.

RICHARD GREGG *et al.*
vs.
ROBERT FORSYTH. } In error.

Know all men by these presents that I, Charles Ballance, am held and firmly bound unto Robert Forsyth in the sum of two hundred dollars, to be paid to the said Robert Forsyth, his executors or administrators, to which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly, severally, and firmly by these presents. Sealed with my seal and dated
16 this fourteenth day of October, A. D. 1862.

Whereas Richard Gregg *et al.* have prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in favor of Robert Forsyth, and against them, by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of the above obligation is such, that if the above-named plaintiffs shall prosecute their said writ of error with effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

C. BALLANCE. [SEAL.]

Sealed, signed, and delivered in presence of—

Endorsed: Approved. Thomas Drummond. Filed Oct. 15, 1862.
WM. H. BRADLEY, *Cl'k.*

17 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a full, true, and complete transcript of the bill of exceptions, writ of error, citation, and appeal bond, in the case of Robert Forsyth *v.* Richard Gregg and Charles Ballance, taken on a motion for a writ of restitution, as the same appears from the originals thereof now on file in said court.

In testimony whereof, I have hereunto set my hand and affixed the [SEAL.] seal of said court, at office in Chicago, this 2d day of December, A. D. 1862, and of our independence the 87th year.

WM. H. BRADLEY, *Cl'k.*

18 Said appellant, by Ballance, his attorney, comes and says that in he record and proceedings aforesaid there is manifest error

in this, to wit: said circuit court ought to have sustained said motion for a writ of restitution, instead of overruling the same. For which error, and others apparent in said record and proceedings, he prays that said judgment may be vacated, overruled, and for nothing esteemed.

C. BALLANCE, *for Appellant.*

Filed 8 Dec., 1862.

693.

SUPREME COURT OF THE UNITED STATES.

No. --------DECEMBER TERM, A. D. 1863.

Richard Gregg & Charles Ballance,

vs.

Robert Forsyth.

In Error to the Northern District of Illinois.

Forsyth obtained a judgment in ejectment against Gregg the tenant, and Ballance his landlord. The latter, by writ of error carried the case to the Supreme Court. The writ of error was dismissed, upon technical grounds, without any examination into the merits. A second writ of error was obtained, and the cause carried up again, and argued and decided upon its merits, infavor of plaintiffs (Gregg & Ballance.) But as is the usage in such cases, the cause was remanded for another trial, should defendant (Forsyth) think it his interest to have one.

As soon as the first writ of error was dismissed, and before there was time to take out the second, a writ of possession was sued out, and defendants (below) turned out. After the cause was decided on its merits, in favor of plaintiffs, (here) they moved the Circuit Court for a writ of restitution, upon the ground that the judgment, which was the basis of the writ of possession, by virtue of which they had been dispossessed, had been disannulled, and swept away.

As short as this is, it is the whole story. There is but one question in the case: Can a man who has obtained possession under an erroneous judgment, retain the possession, after the judgment has been disannulled? Can a man who has no title to a tract of land, hold it forever because, by some

means, foul or fair, he has obtained a judgment, and been put in possession? It is no answer to this question to say, the cause has been remanded, for where the Supreme Court has decided the case on its merits, against the defendant, he is not likely to carry it back to the Circuit Court for further proceedings. The possession is all he was after, and that he has obtained. And should the present plaintiff's re-instate the case on the docket of the Circuit Court, and take out a *venire de novo*, he would, of course, dismiss the suit, leaving the present plaintiffs without any adequate remedy.

It is no answer to this to say, that after defendant had obtained possession, in this way, the present plaintiffs might bring suit against the present defendant. In the first place it would be a great wrong to them, who had been in the peaceable possession for a quarter of a century, to be dispossessed by means of the machinery of a court of justice, by one who has never had possession, and whom the court has now decided had no title. Secondly: Suppose, by the loss of a paper, the burning of a record, or the death of a witness, the action could not now be sustained, what remedy could now be had? This is not a fanciful supposition. There are many valuable farms in the Military Tract, in Illinois, which the owner being once dispossessed of, he could never regain the possession of, by ejectment. Deeds have sometimes been burnt or lost, and sometimes were invalid from the beginning, though made in good faith, and often they were taken from heirs who were well known at the time, but whose heirship could not now be proved.

The doctrine I understand to be well settled, that when a judgment has been reversed, the plaintiff in error shall be restored to all he has lost by reason of the wrongful judgment. —Samson *vs* Juxon, Cro. Jac. 699. 2 Will. Saund. 101, ee.— 2 Tidd's Prac. 955. Martin *vs.* Woodruff, 3 Ind. 238.

This is not an attempt to induce the Court to adjudicate anything in a summary way, but it appearing that the Circuit Court had wrongfully put a man out of possession, it was only asked to replace him, and leave the parties in statu quo, without any reference to whether either of them might think proper to litigate the matter further.

It has been objected that a writ of error cannot be sustained in this case, because the judgment upon which it was sued out was not final. Why was it not final? Because something more might be done in the case? Then no judgment in ejectment in Illinois, is final; for any defendant, without showing any cause, but simply by paying the cost, may at any time, within a year, have a judgment against him set aside, and the case placed in the position it would have been in, had it never been entered; and any infant defendant can do the same thing, within two years. On the Court becoming convinced that the rights of the parties might be better sustained, upon another trial, it can set the whole proceedings aside, with or without the payment of costs. See Ill. Ejectment Law.

The rule is that an appeal or writ of error, cannot be maintained from a judgment dissolving an injunction, because the injunction is generally incidental, and the dissolving of it interlocutory to the final decree; but if the only object of the bill was to obtain and maintain that injunction, an exception to the rule would have arisen, and an appeal would be sustainable, upon the dissolution of the injunction. A contrary doctrine would make a court of equity a court to produce irreparable mischief, instead of a court to prevent it.

As long as a bill is retained for further action upon it, all proceedings and orders in the case are usually interlocutory, and consequently an appeal or writ of error cannot lie. But should any one of these orders close the rights of either party, so as to require the payment of a sum of money, or article of property, his right to an appeal or writ of error would at once become perfect. So in this case, whether Forsyth should or should not intend to litigate the action of ejectment further, as soon as an order was made changing the possession, the right of Gregg et al. to a writ of error became perfect. The possession is all Forsyth wants. If he can get into the possession he will at once dismiss the ejectment suit, as he has done in other cases.

This law should have a reasonable construction. It should have such a construction as would effectuate the objects Congress had in view, in passing it, to wit: That while it should prevent, as far as possible, litigation in detail, and require a

whole case to be brought up at once, it nevertheless should secure to the dissatisfied party, a fair trial in the court above.—If the writ of error should not be sustained, in this case, the court will not only prevent litigation in detail, but it will prevent it altogether, and virtually take the land from one who has been in possession of it for thirty years, and give it to one whom they have heretofore decided had no title to it!

The law, on this subject, is correctly laid down in Forgay *vs* Conrad, 6 How. 201, and the two following cases, in the same volume, of Perkins vs. Turniquet et al., and Pulliam et al. *vs.* Christian et al. Although the last case was an appeal from an interlocutory decree, and although the appeal was dismissed; yet the reasoning of the Court shows plainly it would not have been dismissed had the possession been changed by it.

In the case of Breading's heirs *vs.* Taylor, 6 Dana, 228, top paging, 147 bottom paging, the Court say: "The order for restitution being as it was enforcible by the process of the law, beyond the controul of the Court, between the end of the term at which it was granted, and the commencement of the next succeeding term, was in our opinion, therefore, so far final as to be subject to be set aside on an appeal or writ of error to this Court."

In the case of Madison *vs.* Wallace, 2 Dana, 63, the writ of error, as in this case, was sued out before the suit was finally disposed of, but this objection seems not to have been raised.—Many such appeals appear to have been taken in Kentucky, and yet I have found but one case in which the question seems to have been raised, and that the one above named. It seems also to have been looked upon as a matter of course, that where an order was made to change the possession of land, or require money to be paid to the opposite party, an appeal or writ of error would lie.

In the case of Adams *vs.* Bush, 5 Watts, 292, the Supreme Court of Pennsylvania fully sustains my views on this subject.

In the case of Pentecost *vs.* M'Ghee, 2 Scam. 327, the Supreme Court of Illinois sustain what is said above, with regard to injunctions.

C. BALLANCE,
For Appellants.